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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

PETER JOSEPH PHOENIX,

Defendant and Appellant.

B194409

(Los Angeles County
Super. Ct. No. GA061023)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Rafael A. Ongkeko, Judge. Affirmed.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Joseph P. Lee and Karen Bissonnette, Deputy Attorneys General, for Plaintiff and Respondent.

Peter Joseph Phoenix, also known as Peter Miller and Mike Fernando, appeals from the judgment entered upon his convictions by jury of four counts of first degree burglary (Pen. Code, § 459).¹ The jury also found to be true as to each count the allegations that all of the victims were 65 years of age or older within the meaning of section 667.9, subdivision (a) and that another person, other than an accomplice, was present in the residence during the commission of the burglary within the meaning of section 667.5, subdivision (c)(21). The trial court found to be true the allegation that appellant had suffered two prior felony convictions within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivision (a) and subdivisions (b) through (i). The court sentenced appellant to an aggregate prison term of 144 years to life. Appellant contends that the trial court abused its discretion in denying his *Romero*² motion.

We affirm.

FACTUAL BACKGROUND

On January 27, 2005, at approximately 12:30 p.m., Marie Miguel knocked on the door of 72-year-old, wheelchair-bound Eula Weir, who was alone at her home in Azusa. Miguel told Weir that she had grown up in a nearby house, and asked if Weir remembered her, as she inched into Weir's living room. Miguel employed a series of ruses to remain in the house, including asking for a glass of water and then for a cookie, claiming she was a diabetic. Appellant then knocked on the door, and Miguel identified him as her boyfriend. When Weir got to the door, appellant already had his foot inside the door. Miguel asked Weir if she had change for a \$100 bill, claiming he needed a smaller bill to purchase gasoline. After Weir said that she did not, appellant and Miguel left. A few days later, Weir found that an old camera and six or eight items of good jewelry were missing.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

On February 14, 2005, between 8:00 and 9:00 p.m., Miguel knocked on the door at the home of 87-year-old Loretta Hawn, in Alhambra. Hawn answered and Miguel claimed that she formerly lived across the street and was giving roses to her old neighbors, as it was Valentine's Day. When Hawn partially opened the screen door to take the rose, Miguel pushed her way into the living room and asked to sit down and for some water, which Hawn went to get. When she returned, appellant was standing on the porch and telling Miguel that they should go. Miguel told appellant that she wanted to tell Hawn why she was there. Appellant stepped into the house, and asked to use the bathroom. While he did, Miguel diverted Hawn's attention to the television that was on. Hawn went to check if appellant found the bathroom and saw him standing at the bathroom door smiling. As they were about to leave, Hawn went to the kitchen to put the water she had given Miguel in a glass, into a paper cup so Miguel could take it with her. When she returned to the living room, appellant and Miguel were gone. Hawn discovered that \$200 had been taken from her wallet.

On March 29, 2005, at 9:45 a.m., 68-year-old Bruce Dirksen, using a walker, was in front of his house in Arcadia. When someone called his name, he turned and saw appellant and Miguel in a minivan. Appellant said that he needed to buy gasoline, but only had a \$100 bill which two gas stations had refused to accept. Dirksen said he could provide change and went into his house, followed by appellant and Miguel. Inside, they chatted with Dirksen and his wife. Dirksen counted five 20's from the \$260 to \$280 he had in a money clip on the bar. Miguel went outside to look at the pool, and appellant went to the car to get the \$100 bill. When he returned, he said he did not need the change because he had found a \$20 bill in the car. Eventually, appellant and Miguel left. The five 20's Dirksen had counted and the other money was gone.

On April 4, 2005, at approximately 3:50 p.m., 86-year-old Kenneth Lambert was napping at his home in Arcadia. His wife woke him when she heard Miguel and appellant call his name from outside. Miguel said she was a former neighbor. Appellant asked to use the bathroom, went inside the house and disappeared from sight for 20 to 25 minutes, as Miguel talked to the Lamberts, distracting them. When appellant reappeared,

he said he had a stomachache. He and Miguel left to go to the drugstore. The Lamberts discovered that \$35 dollars had been taken from Lambert's wallet and \$1,200 from his wife's purse. They later discovered that jewelry had also been taken.

DISCUSSION

Appellant was convicted of four counts of first degree burglary of persons 65 years or older, with a person other than appellant and an accomplice present. The trial court found that he had suffered two prior felony strikes and served two prior prison terms. It sentenced him on each of the four burglary counts to 25 years to life as a three striker, plus one year pursuant to section 667.9, subdivision (a) and 10 years pursuant to section 667, subdivision (a)(1).

Appellant's prior criminal record included a 1996 conviction of residential burglary in Illinois, for which he was sentenced to two years "special probation," a 1998 conviction of forging a narcotics prescription, for which he received three years probation with 180 days of local custody, a 1999 first-degree, distraction-type residential burglary conviction, for which he was sentenced to two years in state prison, and, while still on parole for that offense, a 2000 distraction-type first-degree, residential burglary of an 88-year-old man, for which he was sentenced to four years in state prison. Appellant was on parole when he committed the current offenses, and the probation report suggested that he may have been involved in as many as 20 additional distraction burglaries.

Before trial, appellant made a *Romero* motion to strike his priors pursuant to section 1385 on the grounds that (1) his prior criminal history displayed a lack of violence, (2) his criminal history was not long, (3) punishment under the Three Strikes law was disproportionate to the severity of the offense, (4) he displayed remorse for his conduct, (5) his criminal history was the result of addiction to a controlled substance, and (6) even if one of his felony strikes was dismissed, he would still receive a lengthy sentence under a two strikes sentence. The People argued that the Three Strikes law addresses habitual criminal offenders and that this was a textbook case of an individual who is unable to remain out of custody without victimizing others who are the most vulnerable members of society.

The trial court denied the motion, giving a lengthy explanation of its ruling. It observed that appellant's prior convictions involved "pre-selected elderly victims with evidence of planning, sophistication and active involvement on defendant's part." The crimes were committed whenever appellant was not incarcerated and there were no significant offense free periods, nor was there a single period of aberrant behavior. Within months after his last two paroles, appellant committed a new offense. The victims were all elderly people, physically infirm and unsuspecting. The four charged offenses occurred in "rapid succession" and were premeditated. The trial court found that the charged crimes were "serious and violent." Given the consistency of his offending, "[n]othing suggests a law-abiding future here." While appellant's drug use was hinted at, the trial court did not find it sufficient to constitute a mitigating factor. The offenses were not haphazard during a drug psychosis, but were the result of calculated planning.

Appellant contends that the trial court abused its discretion in denying his motion to strike prior felony convictions, thereby violating his due process rights. He argues that the trial court failed to give adequate consideration to the disproportionate severity of his sentence as compared to the seriousness of his offenses, to his "[d]rug-related difficulties," and that the trial court never considered striking one or both of his prior strikes and was predisposed to not striking any of the priors. We find no abuse of discretion.

Section 1385 provides in part: "The judge . . . may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." (§ 1385, subd. (a).) *Romero* held that trial courts have authority to strike a prior conviction pursuant to section 1385. In deciding whether to do so, the trial court must take into account the defendant's background, the nature of his current offense and other individualized considerations. (*Romero, supra*, 13 Cal.4th at p. 531.) Determining what constitutes "'in furtherance of justice'" entails consideration "'both of the constitutional rights of the defendant, and *the interests of society represented by the People . . .*'" . . . At the very least, the reason for dismissal must be "that which would motivate a reasonable judge." (*Id.* at pp. 530–531.) Thus, in

deciding whether to strike a prior conviction, “the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.) There is no case law that compels a judge to strike a prior conviction where there is an “unrelenting record of recidivism” (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320), and he is “the kind of revolving-door career criminal for whom the Three Strikes law was devised.” (*Ibid.*)

“The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. . . . In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978.)

We review the trial court’s decision for abuse of discretion. (*People v. Williams, supra*, 17 Cal.4th at p. 158; *Romero, supra*, 13 Cal.4th at p. 504.) Where the record indicates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the Three Strikes law, we will affirm the trial court’s ruling, even if we might have ruled differently in the first instance. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) “A decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” (*People v. Superior Court (Alvarez), supra*, 14 Cal.4th at pp. 977–978.) The trial court “is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary.” (*People v. Myers, supra*, at p. 310.)

The record fails to support appellant’s charge that the trial court had a “predisposition to not striking both or at least one of appellant’s ‘strike’ prior felony convictions.” The trial court listened to all of the arguments and gave a cogent and

detailed explanation of its refusal to strike either of appellant's prior felony strike convictions. It considered appellant's prior criminal history, the nature of his current offenses, his age and evidence regarding his drug use.

While a 144-year sentence for four first degree burglary convictions might appear excessive in the abstract, given the nature of those offenses and other factors, we cannot say that the trial court's ruling was irrational or arbitrary. Although appellant's criminal history is not the worst that has come before us, it is nonetheless considerable. If, as he claims, that history spans a comparatively short period of time, that is likely attributable to his comparative youth as appellant was only 27 at the time of trial, and for much of that time he was incarcerated. Appellant still managed to commit numerous offenses involving intricate planning and sophistication, victimizing the most vulnerable in our society, the elderly and the infirm. Crimes against these victims present a greater risk of physical injury due to the victims' physically compromised conditions and psychic injury from their heightened sense of vulnerability and loss of security.

Appellant's attempt to mitigate his criminal record by attributing it to a drug problem is not convincing. As the trial court pointed out, the evidence of an ongoing drug problem was de minimis. There was no evidence appellant did anything to attempt to treat his purported drug problem, and there is nothing in the record to suggest that any of his offenses were driven by a drug problem.

While appellant claims that there was no violence involved in the commission of his offenses, the Legislature has determined that such offenses are "violent felonies" within the Three Strikes law. (§ 667.5, subd. (c)(21).) The sentence imposed comports with the Legislature's intent. Two prior prison terms failed to deter appellant from resuming his criminal ways shortly after his release from prison. He was on parole when the charged offenses were committed, and his prior performance on parole was poor.

Appellant points to *People v. Bishop* (1997) 56 Cal.App.4th 1245, in which the Court of Appeal found that the trial court did not abuse its discretion in dismissing two of the defendant's three prior felony strike convictions because of their remoteness (17 and 20 years old), the nonviolent nature of the defendant's current offense and because he

would still receive a substantial sentence as a two-strike offender. It does not follow that because the Court of Appeal in *Bishop* concluded that the trial court did not abuse its discretion in striking the prior offenses that it would have found an abuse of discretion had the trial court not stricken them. Moreover, given the individualized considerations in determining whether to strike a prior felony conviction, facts of other cases are of limited relevance. Here, the trial court exercised discretion in a manner that was neither arbitrary nor irrational.

DISPOSITION

The judgment is affirmed.

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_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ